

Li (Migration) [2021] AATA 2695 (1 July 2021)

DECISION RECORD

DIVISION: Migration & Refugee Division

APPLICANT: Mrs Wenjing Li

CASE NUMBER: 2104436

HOME AFFAIRS REFERENCE(S): BCC2021/427122

MEMBER: Kira Raif

DATE: 1 July 2021

PLACE OF DECISION: Sydney

DECISION: The Tribunal affirms the decision to cancel the applicant's Subclass (155) (Five Year Resident Return) visa.

Statement made on 01 July 2021 at 10:04am

CATCHWORDS

MIGRATION – Return (Residence) (Class BB) visa – Subclass 155 (Five Year Resident Return) – genuine and continuing relationship to the exclusion of all others and change of circumstances – applicant pregnant to another man before visa granted – one-night stand or new relationship – initial decision to continue sponsored relationship – sudden end of that relationship and claimed start of new relationship, and new partner's visa application, soon after applicant's visa granted – discretion to cancel visa – business plans and contribution to community – physical and mental health – best interests of child – father and extended family in home country – non-refoulement – church membership and attendance – country information – low risk of harm – decision under review affirmed

LEGISLATION

Migration Act 1958 (Cth), ss 104, 107, 109(1)
Migration Regulations 1994 (Cth), r 2.41

CASES

COT15 v MIBP (No 1) (2015) 236 FCR 148
Ibrahim v MHA [2019] FCAFC 89
MIAC v Khadgi (2010) 190 FCR 248
WKMZ v MICMSMA [2021] FCAFC 55

STATEMENT OF DECISION AND REASONS

Application for review

1. This is an application for review of a decision made by a delegate of the Minister for Home Affairs to cancel the applicant's Subclass (155) (Five Year Resident Return) visa under s.109(1) of the *Migration Act 1958* (the Act).
2. The applicant is a national of China, born in May 1976. She was granted the Partner (Migrant) visa in February 2016 and a Resident Return visa (RRV) in January 2021. In February 2021 the applicant was issued with the Notice of Intention to Consider Cancellation (NOICC) because the delegate formed the view that she did not comply with s. 104 of the Act. The applicant provided her response to the NOICC and the visa was cancelled on 30 March 2021. The applicant seeks review of the delegate's decision.
3. The applicant appeared before the Tribunal on 2 and 17 June 2021 to give evidence and present arguments. The Tribunal also received oral evidence from the applicant's former and present partners, Mr Du and Mr Gu. The Tribunal hearings were conducted with the assistance of interpreters in the Mandarin and English languages. The applicant was represented in relation to the review by her registered migration agent. For the following reasons, the Tribunal has concluded that the decision to cancel the applicant's visa should be affirmed.

Relevant law

4. Section 109(1) of the Act allows the Minister to cancel a visa if the visa holder has failed to comply with ss.101, 102, 103, 104, 105 or 107(2) of the Act. Broadly speaking, these sections require non-citizens to provide correct information in their visa applications and passenger cards, not to provide bogus documents and to notify the Department of any incorrect information of which they become aware and of any relevant changes in circumstances.
5. The exercise of the cancellation power under s.109 of the Act is conditional on the Minister issuing a valid notice to the visa holder under s.107 of the Act, providing particulars of the alleged non-compliance. Where a notice is issued that does not comply with the requirements in s.107, the power to cancel the visa does not arise.
6. Section 107A provides that possible non-compliances in connection with a previous visa may be grounds for cancellation of the current visa.

Did the notice comply with the requirements in s.107?

7. Section 107 is only engaged if the Minister or delegate considers that the visa holder has not complied with one of the provisions mentioned in s.107(1). It is only then that the Minister or delegate is entitled to give notice to the visa holder under s.107. Therefore, if a notice is to be given under s.107, the Minister or delegate must have reached a state of mind where they consider that the visa holder has not complied with one or more of the relevant provisions.
8. The Tribunal has considered the validity of the NOICC. The Tribunal is satisfied that it contains sufficient particulars to enable the applicant to identify and address the issues and also that the delegate had reached the necessary state of mind to engage s.107. The Tribunal is satisfied that the notice issued under s.107 complied with the statutory requirements.

Was there non-compliance as described in the s.107 notice?

9. The issue before the Tribunal is whether there was non-compliance in the way described in the s.107 notice, being the manner particularised in the notice, and if so, whether the visa should be cancelled. The non-compliance identified and particularised in the s.107 notice was non-compliance with s. 104 of the Act.
10. The applicant provided to the Tribunal a copy of the primary decision record. It indicates that the applicant was granted the Provisional Partner visa in subclass 309 on 10 August 2013 on the basis of her relationship with Mr Jiangtao Du. The applicant arrived in Australia in September 2013 and made the application for the Partner (Migrant) visa in subclass 100 on 29 July 2015. The applicant completed the application form and in that form she stated that the sponsor was Mr Jiangtao Du and that their relationship was still genuine and continuing. The applicant also signed a declaration at page 12 of the form indicating that she had read and understood the information provided in the application and that the information was complete and correct in every detail. The applicant undertook to inform the Department if she became aware of a change in circumstances or of any change relating to the information provided on the form. The applicant was granted the Partner visa on 16 February 2016.
11. The primary decision record indicates that the applicant was pregnant when she arrived in Australia in March 2016 and she gave birth to the child in August 2016. The father of the child is listed as Feng Gu and the child was conceived while the applicant was married to the sponsor and before she was granted the permanent visa. The primary decision record also indicates that the applicant had spent approximately three weeks in Australia after her first arrival, she then departed Australia on 30 April 2016 and returned in October 2018.
12. In December 2018 the applicant sponsored her child for the Child visa. Included with that application was the DNA test result confirming Feng Gu as the father of the child, and the child's birth certificate identifying Feng Gu as the father of the child. In January 2019 the applicant sponsored Mr Gu for a Partner visa in Subclass 820 / 801 and that application was subsequently withdrawn in July 2020. The primary decision record indicates that as part of that application, Mr Gu and the applicant provided statements outlining the nature of their relationship. They claimed that they met in January 2006 and drifted apart in 2008 but resumed contact in early 2015. They had a 'romantic night' and later began to consider marriage. In March 2016 the applicant discovered she was pregnant and was advised by the doctor that she conceived in late 2015.
13. In her response to the NOICC and evidence to the Tribunal the applicant described her relationship with the sponsor, stating that they started dating in August 2011 and married in May 2012. She states that in 2014 the sponsor returned to Australia while she remained in China for work reasons but they maintained contact and visited each other and shared their finances. The applicant states that in late 2015 while on a business trip, she consumed alcohol and had a 'one night stand' and she felt ashamed and afraid and decided to confess to her husband, who was initially angry but later forgave her. She decided to travel to Australia and resigned from her employment and soon realised she was pregnant. When she declared the pregnancy to her husband, he agreed to raise the child as his own but his mother gave her the option of divorce or an abortion. She had no option but to divorce, which they did in China in May 2016. The applicant states that she was not aware of her pregnancy until March 2016 and had not breached s. 104. The applicant notes that she and the sponsor were trying to conceive but were not successful. The applicant states that she had a genuine relationship with the sponsor until April 2016 and the one night stand does not mean her relationship with the sponsor was not to the exclusion of all others. The applicant presented a statement from the sponsor, who confirmed the applicant's evidence. There are also statements from third parties who also reiterate the applicant's claims about her relationship with Mr Du.

14. In her written submissions to the Tribunal of 26 May 2021 and 1 June 2021 the applicant also submits that the child was the result of a 'one night stand' around November 2015 and the sexual exclusivity is not a requirement of the definition of 'spouse'. The applicant submits that there was no relationship with the child's father Mr Gu until her relationship with the sponsor ended. The applicant outlines the circumstances surrounding the pregnancy, stating that she was unaware of the pregnancy prior to the grant of the permanent visa and until that time, her relationship with the sponsor was genuine and continuing. The applicant's written submission was accompanied by a number of documents, including documents relating to Mr Gu's circumstances, and the Tribunal has had regard to these materials.
15. In oral evidence, the applicant told the Tribunal that her relationship with the sponsor was good and they visited each other in different cities where they lived. The applicant states that in late 2015 they decided to 'reunite' and settle down in Australia, which meant that one of them had to resign their job. They tried hard to start the family. The applicant states that despite the one night stand in November 2015, Mr Du forgave her and they decided that she would go to Australia to reunite with him. The applicant states that in March 2016 she realised she was pregnant and both she and Mr Du were thrilled. She flew to China and attended a prenatal check on 4 April. The result showed that Mr Du was not the biological father of the child and they were both devastated. They thought about the time they had spent together and this reaffirmed their commitment to each other so they decided to bring up the child together. On 6 April they visited Mr Du's mother and told her the news. When they told her that Mr Du was not the biological father, she was furious and insisted that they should have an abortion or get divorced. The mother was not in a good condition, so the applicant returned to Australia on her own while Mr Du stayed in China. After two days they had a WeChat communication and decided to divorce. The applicant confirmed that it was only the mother's interference that caused the breakdown of the relationship and prior to 6 April they had a good relationship and there were no issues. The applicant stated that there were no concerns and no problems in her relationship with Mr Du and no other issues. The applicant states that the mother's ultimatum was the only reason the relationship ended.
16. The applicant states that after the one night stand she returned to Beijing on 11 December 2015. She claims that the sponsor forgave her the one night stand and they decided to reunite at any cost and she made the decision to move to Australia, even though she was anxious about her future. The oral evidence of Mr Du and Mr Gu was largely consistent with the applicant's evidence with respect these matters.
17. The Tribunal finds the applicant's submissions unpersuasive. Firstly, the Tribunal is concerned about the timing of the various events. That is, the applicant's relationship with the sponsor ended, on her evidence, within two months of the applicant being granted the permanent Partner visa and shortly after she was immigration cleared. It was not earlier when she found out and told Mr Du that she was pregnant. It was not when she claims she had a 'one night stand' with Mr Gu and when she claims Mr Du forgave her. It was only at the time the applicant was granted her Partner visa and no longer needed the sponsor to remain in Australia.
18. It is equally concerning, in the Tribunal's view, that on her present evidence, the applicant's relationship with Mr Gu developed so quickly after she divorced the sponsor. The applicant's evidence is that she entered Australia on 22 March 2016 (when the obligation under s. 104 continued). She claims it was in early April 2016 that she was given the ultimatum by Mr Du's mother and two days later they decided to divorce. She told the Tribunal that before the divorce and before she told Mr Gu about his paternity, there was nothing between them. The applicant and Mr Gu married in June 2016. That is, within about two months, the applicant claims to have completely ended her committed relationship with Mr Du and developed a committed and loving relationship with Mr Gu, which did not exist previously. The Tribunal considers this highly unlikely and is not satisfied the applicant has presented an accurate

and a truthful version of events. The haste with which these events occurred suggests to the Tribunal that the applicant's relationship with Mr Gu commenced much earlier than what she now claims.

19. Secondly, the Tribunal places weight on the birth of the child from another relationship. The Tribunal accepts the applicant's submission that having a one night stand and a sexual intercourse does not mean that she was in a relationship with another person and that her relationship with the sponsor was not to the exclusion of all others. However, in this case, the Tribunal is not satisfied the applicant's relationship with Mr Gu was merely a 'one night stand' until the time the applicant was granted her permanent visa and immigration cleared. The applicant claims in her response to the NOICC that she was told by a doctor in Australia that there was a low likelihood of her falling pregnant due to her condition and although she and the sponsor kept trying for some years, 'nothing happened'. The applicant told the Tribunal that she sought fertility help, was taking supplements and undertaking other activities to aid fertility for a number of years. Her evidence is that despite these efforts, she did not fall pregnant during her relationship with Mr Du. The applicant's evidence to the Tribunal is that the issue was with her own health, as well as Mr Du's. In such circumstances, the Tribunal considers the likelihood of conception as a result of a 'one night stand' with Mr Gu to be extremely low (despite it being possible). The Tribunal considers it much more likely that the applicant did have a relationship with Mr Gu and more interactions than the one night stand to which she now refers. That would mean that her relationship with the sponsor was not to the exclusion of all others by the time of visa grant.
20. Thirdly, the Tribunal places significant weight on the fact that the applicant's version of events provided in support of the visa cancellation process is not consistent with the information provided by Mr Gu in his own application for the Partner visa (for which the applicant acted as a sponsor and, on her own evidence, assisted him with the application, having sought the help of a migration professional in Australia). There are several discrepancies in the evidence as outlined below.

- a. The applicant, who acted as a sponsor for Mr Gu, provided a "relationship statement" dated 1 December 2018. In that statement the applicant claimed, relevantly,

After returning to Beijing, I began to seriously think about my marriage. In March 2016 when I was still confused with my future life, I found out that I was pregnant... The fact that Feng is the father of my baby encouraged me to face my failed marriage with my former husband, Jiangtao, and my true love for Feng. I realized that I have to end my relationship with Jiangtao as soon as possible to avoid hurting each other. After communicating with him we decided to divorce in May 2016.

21. In her evidence to the Tribunal the applicant stated that there were no issues in her relationship with Mr Du. The applicant explained that when stating that she was confused about her future life, she was concerned about her financial future in Australia and not the relationship but in the Tribunal's view, that is not consistent with the applicant's reference to the 'failed marriage' with Mr Du and her love for Feng, the reference to her discussion with Mr Du about the divorce and the fact that she refers to the confusion about future life when also mentioning about 'serious thinking' about the marriage. There is nothing in the above statement that indicates that the applicant was worried about her financial future but the clear implication in that statement is that the applicant's marriage with Mr Du was not going well and she was considering the difficulties in their relationship. That is not the evidence the applicant and Mr Du gave to the Tribunal when claiming there were no issues in their marriage.

22. The applicant explains in her submission of 22 June 2021 that the one night stand and the discovery of pregnancy did lead her to think about the relationship and

hence she refers to being confused about her future life but her state of mind or concerns about the relationship did not constitute a change of circumstances to enliven s. 104 obligations. (The Tribunal is mindful that the applicant's claim that she was concerned about the future, following the discovery of the pregnancy may be somewhat contradictory to the applicant's oral evidence that she had no concerns about her relationship with Mr Du.) The Tribunal accepts that mere concerns about the relationship or about the future with one's partner are not sufficient to give rise to s. 104 obligations. However, in this case, and for the reasons set out in this decision, the Tribunal has formed the view that prior to her entry to Australia, the applicant had more than mere concerns about her relationship with the sponsor. Notably, the Tribunal is mindful that the information in the statement that accompanied Mr Gu's application describes more than mere concerns about the future. When read as a whole, the applicant refers in that statement to concerns about her future, following the discovery of pregnancy, her failed marriage with Mr Du and her 'true love' for Mr Gu. When read as a whole, the Tribunal does not accept that the statement described mere financial worries, hesitation or change of mind.

- a. Mr Gu also stated in his application form for the Partner visa that the applicant's relationship with Mr Du ended due to "differences in relation to religious beliefs, family values, personal hobbies and lifestyles". There is no mention that the relationship ended because Mr Du's mother disapproved of him raising the child and that he followed the advice of his mother. It is also inconsistent with the applicant's evidence to the Tribunal that there were no issues in her relationship with Mr Du and no concerns about anything and it was only through the interference of his mother that they decided to divorce.

23. The applicant explained to the Tribunal that she did not wish to disclose such personal information to a neighbour who assisted her with the application but in the Tribunal's view, if that was the case, the applicant could have approached a migration agent, rather than a neighbour, so that she could freely disclose information about her relationships that she must have recognised would be significant to the process.

24. The applicant also explains that she sponsored Feng Gu in 2019 and by that time they had been living together as a happy family for two years and that was in contrast with her relationship with Mr Du as they had no child. The Tribunal is of the view that this explanation is at odds with the applicant's earlier evidence that she had a happy marriage with Mr Du and no issues in that marriage before April 2016 when his mother intervened.

25. In her post-hearing submission the applicant states that the relationship broke down after the visa grant and her entry to Australia (presumably the argument is that these discrepancies cannot form the basis of the cancellation). The Tribunal's concern, however, as the Tribunal repeatedly informed the applicant during the hearing, is with her credibility and the plausibility of the present evidence to the Tribunal. The Tribunal considers the discrepancies in the present evidence to the Tribunal and Mr Gu's visa application are relevant to that assessment.

- a. The applicant's evidence to the Tribunal is that she learned about the pregnancy in March 2016 but it was not until they returned to China and did the ultrasound in hospital on 4 April that they realised that Feng was the father of the child. However, included in Mr Gu's application was a declaration (form 888) by Ms Liang in which she stated that she heard from the applicant about the pregnancy in March 2016 and knew at that time that the father was Feng. That is not consistent with the applicant's evidence that she did not know who the father of the child was until about ten days later, in early April.

26. The applicant told the Tribunal that the person who assisted her with the application advised her that she needed a witness statement and made arrangements. She states that Ms Liang did not learn about the pregnancy until later, maybe May. It is of considerable concern to the Tribunal that the applicant submits that a witness statement contains what she now claims to be incorrect information. In the Tribunal's view, that would indicate that not only the applicant and Mr Feng are not reliable witnesses, but also some witnesses who gave evidence on their behalf. This causes the Tribunal to question the veracity or accuracy of third party statements submitted in support of this application.

- a. With respect to the applicant's relationship with Mr Feng Gu, she told the Tribunal that she had contact with him due to work in early 2015 and then they went to Hainan together in the end of 2015. The applicant initially stated that in between they had no contact. She then said that they may have had phone conversations about work matters or to discuss religious matters but she could not recall any face to face contact in that period. (The Tribunal is mindful that the applicant's recall was excellent as she was able to give precise dates in relation to various events that occurred some years ago in her evidence to the Tribunal.) The applicant's oral evidence to the Tribunal is contradictory to the evidence she supplied in her sponsorship statement that accompanied Mr Gu's Partner visa application in which it was claimed that they were friends and their interactions became more frequent after March 2015 and they had participated in outdoor activities together.

27. The applicant explained to the Tribunal that, when describing her interactions with Mr Gu in 2015, she acted on advice of her neighbour who assisted with the application and she was concentrating on common hobbies with Mr Gu and not on other issues such as timing. The Tribunal does not accept that explanation because the applicant not only described the common hobbies but did so in the context of other events, specifically describing the development of the relationship from the resumption of contact in early 2015 to the 'one night stand'. As such, the Tribunal does not accept the applicant's explanation that she was unconcerned with the timing and was only dealing with the common interests. Insofar as the applicant claims that she acted on advice of another person who told her that describing more frequent interactions with Mr Gu would be beneficial to his application, that would suggest that the applicant had deliberately provided incorrect information in that statement in order to assist Mr Gu in obtaining the visa.

- a. The applicant told the Tribunal that her relationship with Mr Gu started at the time they were preparing for the birth of their child and after her divorce with Mr Du, around May 2016. The applicant states that prior to that time, their interactions were work-related. However, in her sponsorship statement the applicant stated that when she found out about the pregnancy in March 2016, she began questioning her failed marriage with Mr Du and her true love for Mr Gu. That would indicate that she considered Feng Gu to be her 'true love' in March 2016 when she discovered the pregnancy, contrary to her claim to the Tribunal that they had no feelings for each other before May 2016.

28. The Tribunal has formed the view that the information the applicant presented in her sponsorship statement submitted with Mr Gu's partner application is inconsistent with the version of events provided by the applicant in response to the NOICC and to this Tribunal.
29. The applicant offered a number of explanations for these discrepancies. Essentially, the applicant claims that her English was not good and the statement was prepared with the assistance of a neighbour and she did not get a chance to read it. The applicant claims she did not release until 2020 that the statement in support of Mr Feng's application was

incorrect. The applicant states that the information she presently provided is correct but there were mistakes in the earlier statement. The applicant states that she had made a 'careless mistake'. Mr Gu's evidence to the Tribunal is that he did not have much involvement with the form and the application and that it was the applicant who was responsible for the application. The Tribunal does not accept these explanations. The Tribunal is of the view that the applicant would have been well aware of the significance of such a document to the visa process (having made her own partner visa application) and of the importance of the visa process itself to the grant of the visa to Mr Gu and the Tribunal does not accept the applicant would have carelessly signed a document without understanding its content. This is particularly so given the applicant's background as a senior company official (to which she refers in various statements) so the applicant would have been well aware of the importance of reading and understanding documents before signing. The Tribunal is also of the view that whoever prepared the statement would have done so from the applicant's own words. That is, the applicant would have dictated the information that the other person had recorded. Thus, the Tribunal does not consider it likely that the other person would provide information that was entirely untrue or inconsistent with the applicant's own evidence.

30. The applicant (and Mr Gu) also suggested that maybe the person who wrote the statement did not record the information accurately but for the reasons stated above, the Tribunal does not accept that the applicant was not familiar with the content of the statement before it was submitted. The applicant also suggested that she did not want to disclose personal circumstances to the person who provided the statement but the Tribunal rejects that explanation, Firstly because the Tribunal does not accept the applicant would have relied on the help of a neighbour rather than an independent person if she felt uncomfortable disclosing personal information and, secondly, because she did expressly refer to the failed marriage and differences with her husband in the sponsorship statement and the Tribunal does not consider she would have done so if she now claims that information was entirely incorrect.
31. The applicant states that after she sponsored her daughter and the application was taking too long, she realised in 2020 that the sponsorship statement in Mr Gu's application was incorrect. She claims she spoke to a migration lawyer about what could be done. In the Tribunal's view, there is no reason why the applicant's present evidence should be considered as truthful and reliable and her earlier sponsorship statement (which was also supported by third parties' evidence) as untrue. In the Tribunal's view, that explanation is made to assist the applicant with the present process. Notably, neither the applicant nor Mr Gu informed the Department that the information in the statement was incorrect. The applicant told the Tribunal that she consulted a lawyer and they decided to withdraw Mr Feng's application but neither had corrected the statement before the applicant was issued with the NOICC. The Tribunal is of the view that the decision to withdraw Mr Gu's application was made so as not to jeopardise the applicant's visa and not because the information in that application was considered to be incorrect. The applicant's evidence would indicate that both knew the information they provided was incorrect and no effort was made to correct the information. If that evidence is accepted (and the Tribunal does not accept it was the information in Mr Gu's statement that was incorrect, rather than the present evidence), that would suggest, in the Tribunal's view that the applicant and Mr Gu are untruthful witnesses and that their evidence is unreliable as both are willing to provide whatever information they believe would better suit their circumstances.
32. In her submission of 23 June 2021 the applicant explains that she was sponsoring her child and husband and it is understandable that she had 'glossed over' the facts while the information provided in Mr Gu's application was broadly correct. The applicant states that the statements in Mr Gu's application was too broad to constitute a traversal of truth but were created to produce a favourable outcome. In the Tribunal's view, the applicant's suggestion

that information submitted in the application was inaccurate (at best) and created to produce a favourable outcome is supportive of the Tribunal's finding that the applicant is not a person of credibility and that she is willing to exaggerate, 'gloss over the truth' or be expressly untruthful to produce a favourable outcome.

33. The applicant and Mr Gu claim, essentially, that the evidence that was provided with Mr Gu's Partner visa application was inaccurate or incorrect (and the applicant's evidence to the Tribunal is that she had assisted with that application and prepared the witness statement with the assistance of another person) yet the information the applicant gave in the present process is correct and accurate and reliable. The Tribunal cannot reach that conclusion. As noted above, there is no reason, in the Tribunal's view, why the present evidence should be considered any more reliable or truthful than the information submitted in support of Mr Gu's application.
34. The applicant told the Tribunal that she and Mr Gu were ignorant of the migration law and that caused a lot of problems. The Tribunal does not accept that explanation. The applicant has already gone through a visa process herself, having been granted the partner visa, the Tribunal does not consider the applicant was entirely ignorant of the process, even if she was unfamiliar with technicalities.
35. The applicant told the Tribunal that she is of good character and that others have provided character references for her. She states that lying is out of character for her and she would not lie as a Buddhist and as a mother. The Tribunal finds this evidence unconvincing. The applicant's character, her status as a mother and her religion do not guarantee, in the Tribunal's view, that the applicant is a truthful and credible witness. The Tribunal is also mindful that the applicant claims much of the information in her sponsorship statement was incorrect. It is unclear to the Tribunal why the applicant's good character and other characteristics would ensure the present information must be correct while at the same time the information given at other time could be erroneous.
36. The applicant claims that her disclosure of the pregnancy to Mr Du is a sign that their relationship was genuine. The Tribunal does not accept that this is necessarily so, as the disclosure would have been inevitable once the pregnancy became visible. Thus, the disclosure may have been a response to such necessity, rather than an indication of the mutual commitment and a genuine spousal relationship.
37. The applicant submits that there is no solid evidence to conclude that she 'commissioned' others to give false evidence on her behalf in response to the NOICC and she claims the corroborated facts do not suggest that occurred. The applicant refers to that as an 'improbability'. The Tribunal does not consider such conduct to be impossible, improbable, or even unlikely, particularly given the applicant's evidence that the information she and a witness who provided a declaration on Form 888 in support of Mr Gu's application was incorrect. It is possible that the applicant did ask others, and most significantly Mr Du, to assist her with the present process and to give certain evidence. However, it is also possible that Mr Du and others genuinely believed that he had a genuine and mutually committed relationship with the applicant until its breakdown after the grant of the visa. The applicant submits that Mr Du's evidence should be given significant weight. The Tribunal does not make adverse findings about Mr Du's credibility as the Tribunal is unable to determine whether Mr Du's evidence was untruthful in order to assist the applicant, or truthful because he genuinely believed the facts as stated. The Tribunal is not bound to accept Mr Du's views and perceptions as being accurate and correct. Neither must the Tribunal accept the views of others who believed a genuine and exclusion spousal relationship to have existed. Notably, it is not apparent that Mr Du was aware of the information contained in Mr Gu's application and, therefore, of all the circumstances that may have been relevant to his assessment of the relationship. Thus, even if the Tribunal were to find that Mr Du and others

genuinely believed there was a genuine spousal relationship between him and the applicant by the time of visa grant and immigration clearance, the Tribunal's findings on this issue are different.

38. The Tribunal acknowledges third party statements about the applicant's relationship with Mr Du. It is not clear from the statements that the writers were aware of all the circumstances of the applicant's two relationships. The Tribunal also accepts that the applicant did have a genuine and committed and exclusive relationship with Mr Du at some point in time. However, the issue here is whether such a relationship continued to exist until the applicant was granted the permanent visa and until she was immigration cleared.
39. Having regard to the above concerns, the Tribunal has formed the view that the applicant is not a person of credibility and that she is willing to create or fabricate claims to achieve a favourable migration outcome. The Tribunal has formed the view that the applicant has not been truthful in her current description of events and of the nature of her relationship with Mr Du and Mr Gu. The Tribunal has decided to give very limited weight to the evidence of third parties, either because they had provided deliberately untruthful evidence to assist the applicant or because they may have genuinely held the beliefs which the Tribunal does not consider to have been accurate (as the applicant claims to have been the case with the Form 888 submitted with Mr Gu's application). The Tribunal has formed the view that the applicant did form a relationship with Mr Gu around 2015 and that by no later than the conception of the child in late 2015, the applicant's relationship with Mr Du was no longer to the exclusion of all others.
40. The Tribunal does not consider that the applicant's pregnancy can constitute a change in her circumstances because the questions on the application form relate to the existence of children and not pregnancy. The applicant's circumstances had not changed with the pregnancy so that an answer on the form became incorrect. Notably, s. 104 does not apply to any change in circumstances, rather it specifically refers to changes in circumstances so that an answer on the application form becomes incorrect. If there was no question on the forms relating to the applicant's pregnancy, then there can be no changes in circumstances due to pregnancy that gave rise to the obligation to inform under s. 104. However, the Tribunal has formed the view that the applicant did commence a relationship with Mr Gu no later than in 2015 and at that time, the applicant's circumstances changed so that her relationship with the sponsor was not to the exclusion of all others.
41. The Tribunal finds that by the time of conception in 2015, the applicant's circumstances changed so that an answer on the application form (where she referred to having a spousal relationship with Mr Du that was to the exclusion of all others) became incorrect. There is no evidence that the applicant informed the Minister in writing of this change in her circumstances. The Tribunal finds that the applicant had not complied with s. 104 of the Act.
42. For the sake of completeness, the Tribunal accepts the applicant's argument that the provision of incorrect information in Mr Gu's Partner visa application would not have enlivened the operation of s. 104. However, the Tribunal has formed the view that the applicant failed to comply with that provision because of the changes in circumstances relevant to her own visa application and not Mr Gu's application.
43. For these reasons, the Tribunal finds that there was non-compliance with s 104 by the applicant in the way described in the s.107 notice.

Should the visa be cancelled?

44. As the Tribunal has decided that there was non-compliance in the way described in the notice given to the applicant under s.107 of the Act, it is necessary to consider whether the

visa should be cancelled pursuant to s.109(1). Cancellation in this context is discretionary, as there are no mandatory cancellation circumstances prescribed under s.109(2).

45. In exercising this power, the Tribunal must consider the applicant's response (if any) to the s.107 notice about the non-compliance, and have regard to any prescribed circumstances: s.109(1)(b) and (c). The prescribed circumstances are set out in r.2.41 of the Regulations. They are:

The correct information

46. For the reasons set out above, the Tribunal has formed the view that the applicant formed a relationship with a person other than the sponsor before she was granted the permanent Partner visa. Thus, the correct information is that the applicant's relationship with the sponsor was not a mutually committed one and to the exclusion of all others and the applicant was no longer the spouse of Mr Du within the meaning of the Act. The Tribunal considers this factor strongly favours the cancellation of the visa.

The content of the genuine document (if any)

47. This is not relevant in the present case.

Whether the decision to grant a visa or immigration clear the visa holder was based, wholly or partly, on incorrect information or a bogus document

48. A decision to grant a Partner visa is based, primarily, on an assessment of the applicant's relationship with the sponsor. Such an assessment is central to any determination on visa eligibility and requires the decision-maker's satisfaction that the applicant and sponsor have a mutual commitment to a shared life as husband and wife to the exclusion of all others.
49. The Tribunal has formed the view that the applicant formed a relationship with Mr Gu before she was granted the visa on the basis of her relationship with Mr Du. If that information was known to the decision-maker, it would have been highly relevant to the assessment of whether the applicant's relationship with the sponsor was a mutually committed one and to the exclusion of all others and whether the applicant was the spouse of the sponsor for the purpose of the visa grant.
50. The Tribunal finds that the decision to grant the visa was based, in part, but to a significant extent, on incorrect information. The Tribunal considers this factor to be strongly in favour of the cancellation.

The circumstances in which the non-compliance occurred

51. The applicant denies there was any non-compliance but the Tribunal has formed the view, for the reasons stated elsewhere, that the applicant failed to comply with s. 104 and did not inform the Department about the changes in her circumstances. The Tribunal has formed the view that the applicant had deliberately withheld the information about her relationship with Mr Gu when seeking her permanent visa and before being immigration cleared so as to ensure the visa was granted to her.

The present circumstances of the visa holder

52. In her response to the NOICC the applicant refers to her physical and mental health. She states that she has been diagnosed with adjustment disorder with anxiety and depressed mood and potential anxiety disorder since receiving the NOICC. The applicant states that she is worried about the consequence of her visa cancellation and cannot concentrate. The

applicant presented in support of these claims a report from a psychologist. The Tribunal has considerable concern about the fact that the applicant saw the health professional, only when she was preparing her response to the NOICC (the applicant explains to the Tribunal that she saw the psychologist because of the delay with Mr Gu's application and because of Covid). The applicant told the Tribunal she saw the psychologist three times in total, and only once since the report was written. The applicant's evidence is that she has since saw the GP for muscle pain and saw the psychologist again to obtain an updated report and she was told that her condition has worsened. It appears the applicant saw the health professionals for the purpose of obtaining the medical reports to support her application. Nevertheless, the Tribunal accepts the professional opinion of the health professional and is prepared to accept that the applicant suffers from the conditions set out in the reports. The applicant has not satisfied the Tribunal that if she is required to have ongoing treatment (which is not apparent from the report), such treatment would not be available to her in China. The applicant suggested that she would be ashamed to talk about her situation but the Tribunal does not accept that the applicant would be unable or unwilling to seek treatment, if such treatment was required. As such, the Tribunal does not consider that the applicant's health and medical condition weigh against the cancellation or would result in hardship for the applicant.

53. The applicant's daughter is a holder of a Bridging E visa. The applicant refers to her daughter's settlement in Australia, stating that she likes her life and friends and routine in Australia and it would 'break her heart' to leave all of this. The applicant told the Tribunal that her daughter has been accepted into primary school which she would start next year. The applicant states that her daughter is well settled in Australia and Australian life. The applicant's evidence is that her daughter (who is nearly five) came to Australia at the age of 2 and has not returned to China. The Tribunal is prepared to accept that the child may be used to life in Australia and has formed friendships, however, given her young age, the Tribunal is of the view that she would just as easily form routines and friendships if she was to relocate to China. The Tribunal is mindful that despite the connections the child had formed in China prior to her migration to Australia, the applicant made the decision to uproot the child (and effectively remove the child from her father and extended family) and to bring the child to Australia where she was able to form new routines and new connections. In the same way, the Tribunal is of the view that the child would be able to re-settle in China, should a decision be made for the child to leave Australia and that in China, the child would also have the support of her father and grandparents. This is so despite the child now being older.
54. The applicant refers to the financial hardship that would be caused by the cancellation of the visa. The applicant states that before migrating to Australia, she quit her job in China and purchased a property in Australia and if her visa is cancelled, she would have to sell the property within a short period and find another job in China, which would be difficult given her absence from China. The Tribunal acknowledges that if the applicant was to leave Australia, these may be the consequences of her departure. However, the applicant has not provided any evidence, and has not satisfied the Tribunal, that the sale of her property in Australia would cause financial hardship or even financial loss. Her evidence to the Tribunal is that the house is owned outright, with no mortgage so the applicant may have a substantial financial benefit from the sale of the property. The applicant (and Mr Gu) also told the Tribunal they own two properties in China and the applicant's evidence to the Tribunal is that she has been financially supported by Mr Gu. The Tribunal has formed the view that the applicant has considerable assets and is able to sell the Australian house, if she were to return to China. The Tribunal does not accept the visa cancellation would cause financial hardship to the applicant.
55. Neither has the applicant satisfied the Tribunal that she would be unable to find gainful employment in China, even taking into account her absence from that country. In particular,

the Tribunal is mindful that the applicant's absence from China has not been for a lengthy period. The applicant told the Tribunal that she would make an effort to find a job to support her daughter.

56. The applicant states in her submission to the delegate that contacting her husband again would cause her painful memories and the feeling of guilt. It is not clear to the Tribunal why that would be the case and the Tribunal notes that the applicant had nominated Mr Du as a witness to give evidence to the Tribunal, in addition to the written statements he had provided in response to the NOICC and to the Tribunal. Thus, it was the applicant who made the decision to contact Mr Du and seek his help. If that caused hardship to the applicant, the Tribunal does not consider such hardship would be significant.
57. The applicant told the Tribunal that she intends to operate a business with other friends in Australia but she has been unable to do that due to the cancellation of the visa. The Tribunal accepts that if the applicant does not hold an Australian visa, she may be unable to actively participate in the running of this business venture. The applicant told the Tribunal that she would be a partner in the business and her role would be to develop an app for customer support. If that is the case, the Tribunal is of the view that the applicant would be able to do that (and invest in the company) no matter where she lives and the Tribunal does not accept, having regard to the applicant's description of what her role in the business would be, that she would be unable to perform that role anywhere in the world. In particular, the applicant refers to having to communicate with customers and the Tribunal does not accept that such communication can only happen in Australia. overall, the Tribunal is of the view that the applicant would be able to engage in the business venture irrespective of her visa status and her place of residence (if the cancellation is to lead to her departure from Australia), even if the nature of the applicant's involvement may not be exactly the same. The Tribunal does not accept these matters would cause hardship to the applicant or her prospective business partners.
58. The applicant states that she has been living in Australia for a number of years, has integrated into the community and has commodity support. Her child has been living in Australia for three years, more than the time she has lived in China. Her 'circle of life' is in Australia. While the Tribunal accepts all of that evidence, the Tribunal is mindful that the applicant had previously established her life in China, where she had spent the majority of her life, had formed friendships, had close family and other support networks. Her daughter had also been living in China and was used to life in China. Despite these circumstances, the applicant made the decision to relocate herself, and her daughter to Australia. the Tribunal does not accept that it was acceptable to give up the way of life in China to relocate to Australia but that it would be impossible to do the reverse.
59. The applicant also states that Mr Gu plans to move to Australia and is making arrangements. The Tribunal notes, however, that he has not been granted the visa and does not have an outstanding visa application and it cannot be assumed, in the Tribunal's view, that he would be granted a visa and permitted to settle in Australia until the visa is granted. The Tribunal acknowledges that if the applicant is not a holder of a permanent visa, she cannot sponsor Mr Gu for a visa.
60. The Tribunal considers these factors weigh somewhat against the cancellation.

The subsequent behaviour of the visa holder concerning his or her obligations under Subdivision C of Division 3 of Part 2 of the Act

61. Nothing adverse is known about the applicant's subsequent behaviour concerning her obligations under the Act.

Any other instances of non-compliance by the visa holder known to the Minister

62. There are no other known instances of non-compliance. In her response to the NOICC the applicant states that she is a law abiding citizen, that she previously travelled to many other countries and complied with visa requirements. This factor is neutral.

The time that has elapsed since the non-compliance

63. The Tribunal has formed the view that the applicant's relationship with the sponsor Mr Du ended before she was granted her permanent visa in February 2016 and before she was immigration cleared in March 2016. The obligation to comply with s. 104 continued until the applicant was immigration cleared. Approximately five and a half years passed since the non-compliance. In the Tribunal's view, that is a lengthy period but not a very significant one. The Tribunal acknowledges that this factor weighs somewhat against the cancellation.

Any breaches of the law since the non-compliance and the seriousness of those breaches

64. There are no known breaches of the law. This factor is neutral.

Any contribution made by the holder to the community.

65. In her submission to the delegate the applicant refers to her residence in Australia, stating that she is welcomed and loved by her neighbours. The applicant refers to her settlement in the community and voluntary work in church and she told the Tribunal that she attends church weekly. The applicant states that she studies calligraphy and teaches it to neighbours' children. The applicant refers to the charitable donations she has made and her lifestyle as a Buddhist. The applicant provided in response to the NOICC a number of statements and character references from third parties and other evidence to support these claims and the Tribunal accepts that the applicant had been involved in these activities and that she has made a contribution to the community. The Tribunal accepts the others believe to be of good character. These factors weigh against the cancellation.
66. While these factors must be considered, they do not represent an exhaustive statement of the circumstances that might properly be considered to be relevant in any given case: *MIAC v Khadgi* (2010) 190 FCR 248. The Tribunal may also have regard to lawful government policy. The relevant policy is set out in the Department's Procedural Advice Manual) PAM3 'General visa cancellation powers', which refers to matters such as the consequences of cancelling the visa, international obligations and any other relevant matters.

Whether there would be consequential cancellations under s.140.

67. There are no persons whose visas would be cancelled as a result of the applicant's visa being cancelled, although the Tribunal acknowledges that the applicant would be unable to act as a sponsor to her child and her partner if she does not hold a permanent visa.

If there are children whose interests would be affected by cancellation, or consequential cancellation, decision-makers should consider the best interests of those children as a primary consideration when deciding whether to cancel the visa.

68. The applicant's five year old daughter is in Australia and a holder of a Bridging E visa, having previously applied for a Child visa but that application was withdrawn. The applicant's evidence to the Tribunal is that if her visa is reinstated, she would sponsor her daughter again.

69. The applicant refers to her daughter's settlement in Australia, stating that she is used to the Australian lifestyle, has formed routines and found friendships. The applicant states that her daughter attends an early learning centre and is enrolled in pre-school and she regularly participates in children's activities in church. The applicant states that she does not know how to explain to her daughter that she may have to leave Australia. The applicant told the Tribunal that when her daughter came to Australia, she was only two and her only needs were to eat and sleep but now she has developed friendships and connections and speaks English and it would be difficult for her to give up all of these matters.
70. The Tribunal has addressed these matters above. Essentially the Tribunal accepts that the child is well settled in Australia and has formed friendships and participates in various activities including weekly church attendance. However, the Tribunal has formed the view that given the child's young age, she would be able to resettle in China equally well. The child has been living in Australia for approximately three years, which is not a very lengthy period, and has been able to settle in this country, having given up on her connections and friendships in China. The Tribunal acknowledges the child was younger when she migrated to Australia but the Tribunal is of the view that she would be able to do the same equally well, if she were to return to China, at the age of five. The applicant's evidence is that her daughter does communicate in Chinese with family members and is able to do so, so she would be able to communicate with others if the daughter was to live in China.
71. The applicant told the Tribunal that it would not be good for her daughter to move the house 'all the time' and it may affect the child's mental health. The Tribunal is of the view that there is no probative basis to support that assertion. There are no statements from health professionals or child health specialists indicating that the child's mental health would be in any way affected if she is to return to China (and the Tribunal is mindful that the child does not have an Australian visa and at present, cannot remain in Australia permanently). On the evidence before it, the Tribunal does not accept that the child's mental well-being would be adversely affected as a result of the cancellation.
72. The Tribunal is also of the view that the best interests of a child are best served, in most circumstances, when the child is raised by both parents. In this case, the child's father does not have an Australian visa and lives in China. (While the applicant states that she intends to sponsor him to Australia and Mr Gu plans to live in Australia, he has no visa and at present, no right to live in Australia. The grant of a visa to Mr Gu in the future is nothing more than a mere assumption at present.) That is, if the child is to return to China, she will be able to live with both parents and have access to extended family such as grandparents, which is not available to her in Australia. Thus, the Tribunal has formed the view that the best interests of the child do not require her residence in Australia and would not be adversely affected by the cancellation of the visa.
73. There are no other children who would be affected by the cancellation of the visa.
- Whether the cancellation would lead to the person's removal in breach of Australia's non-refoulement or family unity obligations.*
74. The phrase 'non-refoulement obligations' is not confined to the protection obligations to which s.36(2) of the Act refers: see *Ibrahim v MHA* [2019] FCAFC 89 at [103]. It is defined in the Act to include non-refoulement obligations that may arise because Australia is a party to one of the instruments, or any obligations accorded by customary international law that are of a similar kind.
75. The applicant referred to Covid and stated that the Chinese authorities would monitor returnees and she and her child may have to quarantine. If that is the case, this would be a common practice of general application, applicable in many countries and applicable equally

to all arrivals. the Tribunal does not consider that being required to complete quarantine amounts to any form of harm or persecution to give rise to Australia's non-refoulement obligations.

76. The applicant states that she and her daughter attend church weekly and have become part of that lifestyle and it would not be easy to do that in China because there is no church nearby. It may be that the applicant may have to travel further to find a church but there is no apparent reason why the applicant would not be able to attend church. The applicant states that in China, religious beliefs are 'sensitive'. The Tribunal has had regards to the 2019 DFAT report on China, which relevantly states the following with respect to religious beliefs in China:

It is difficult to provide exact figures on the number of religious believers in China. In 2018, the government released a white paper on China's Policies and Practices on Protecting Freedom of Religious Belief (CPPPFRB white paper). This states the major religions practiced in China are Buddhism, Taoism, Islam, Catholicism and Protestantism, and religious believers total almost 200 million (including more than 380,000 clerical personnel). The white paper also notes the majority of 10 of China's ethnic minorities, totalling 20 million people, follow Islam (around 57,000 clerical personnel); 6 million follow Catholicism (8,000 clerical personnel); and 38 million follow Protestantism (57,000 clerical personnel).

The CPPPFRB white paper indicates there are also approximately 5,500 religious groups in China, including seven national organisations: the Buddhist Association of China, Chinese Taoist Association, China Islamic Association, Chinese Catholic Patriotic Association, Bishop's Conference of Catholic Church in China, National Committee of the Three-Self Patriotic Movement of the Protestant Churches in China, and the Christian Council. There are also an estimated 144,000 places of worship in China: 28,000 Han Buddhist temples; 3,800 Tibetan Buddhist lamaseries; 1,700 Theravada Buddhist temples; 9,000 Taoist temples; 35,000 Islamic mosques; 6,000 Catholic churches and places of assembly spread across 98 dioceses, and 60,000 Protestant churches and places of assembly. China also has 91 religious schools, approved by the State...

In practice, the number of religious believers, places of worship and religious organisations is likely to be much higher - particularly with respect to unregistered organisations (including house churches) which operate in parallel to state sanctioned Christian churches...

Chinese law recognises five religions (Buddhism, Taoism, Islam, Catholicism and Protestantism), members of which must register with the government's Patriotic Associations mentioned above (Protestants must be non-denominational). These organisations must be independent of foreign associations (for example, the Vatican).

Article 36 of the Constitution states that citizens enjoy freedom of religious belief, and that no state organ, public organisation or individual may compel citizens to believe in, or not believe in, any religion. Discrimination on the basis of religion is prohibited by law. According to China's 2018 CPPPFRB white paper, every citizen 'enjoys the freedom to choose whether to believe in a religion; to believe in a certain religion or a denomination of the same religion; to change from a non-believer to a believer and vice versa. Believers and non-believers enjoy the same political, economic, social and cultural rights, and must not be treated differently because of a difference in belief.' However, Article 36 of the Constitution also states that no one may make use of religion to engage in activities that disrupt public order, impair the health of citizens or interfere with the educational system of the State. This is enforced by Chinese public security officials who monitor registered and unregistered religious groups.

77. The Tribunal does not accept that religious observance is a 'sensitive' issue in China. The applicant does not claim she has any desire or will participate in the activities of any

unregistered, unrecognised or 'underground' church in China and having regard to the above information, the Tribunal is of the view that the applicant and her daughter will be able to attend church and engage in religious worship activities upon return to China, if they wish to do so.

78. The Tribunal is also mindful that the present visa is not a protection visa so that s. 48A does not apply, and there does not appear to be anything preventing the applicant from making an application for a protection visa in the future, if she wishes, where the applicant's circumstances would be considered. (The applicant told the Tribunal she is not a refugee and does not need protection.) The Tribunal notes the reasoning in *COT15 v MIBP (No 1)* (2015) 236 FCR 148 where the applicant's Subclass 101 (Child) visa was cancelled and he claimed to fear harm in his home country. The Tribunal affirmed the cancellation, saying that it was satisfied that the applicant's claims could be canvassed in any application for a protection visa. The Court upheld the decision, noting that the cancellation of a visa is legally distinct from removal (at [32]).
79. The Tribunal has also considered the reasoning of the Full Federal Court in *WKMZ v MICMSMA* [2021] FCAFC 55, at [151] which confirms that it is open for a decision maker to find that a person faces a low risk of being returned to a country where they face a real chance of Convention-related harm, based on statements of executive policy that Australia will not do so, in the absence of evidence to the contrary. In this case, there is no evidence to indicate that Australia's usual policy of not returning people to a country where they may face harm would not be followed.
80. For these reasons, the Tribunal has formed the view that Australia's non-refoulement obligations would not be breached as a result of the cancellation.
81. The Tribunal has also considered whether the applicant may face harm of the nature not contemplated by the Refugee protection or complementary protection obligations and, having regard to the applicant's evidence, the Tribunal has decided that this would not be the case.
82. The Tribunal finds that the cancellation of the visa would not be in breach of Australia's international obligations.
83. The applicant has no family in Australia who are permanent residents or Australian citizens. Her husband resides in China and her daughter is not a holder of a permanent visa. The Tribunal is of the view that the applicant has greater family connections outside of Australia and the Tribunal does not consider that family unity obligations would be breached as a result of the cancellation.

Whether there are mandatory legal consequences, such as whether the person would become unlawful and liable to detention and removal, whether detention is a likely consequence of the cancellation decision and if so, for how long, and whether there are provisions in the Act which prevent the person from making a valid application for any visa without the Minister personally intervening.

84. If the applicant's visa is cancelled, and unless she is granted another visa, she would become an unlawful non-citizen and may be subject to detention and removal from Australia. While the applicant is eligible to apply for certain visas in Australia, there are limited types of visas she is able to apply for. If the applicant were to make another visa application offshore, she may be subject to an exclusion period. If the applicant's visa is cancelled, she would lose the entitlements he had acquired as a permanent resident of Australia, including her ability to sponsor other family members for the Australian visas. These factors weigh against the cancellation.

Any other relevant matters (including the degree of hardship that may be caused to the visa holder and any family members).

85. In her response to the NOICC and evidence to the Tribunal the applicant outlined the hardship that would be caused by the cancellation of the visa, including her own health and well-being, the daughter's settlement in Australia, financial hardship and other matters. The applicant reiterated this evidence in oral evidence to the Tribunal. The applicant's submissions have been addressed above.
86. The applicant provided a number of character references and statement of support from the community, religious and other representatives. The Tribunal acknowledges that evidence and accepts that those who provided statements believe the applicant to be a person of good character. These factors weigh against the cancellation.
87. The Tribunal has considered the totality of the applicant's circumstances. The Tribunal has formed the view that the applicant did not comply with s.104 of the Act and that there are grounds for cancelling her visa.
88. The Tribunal finds that there are several factors that weigh against the cancellation. Most significantly, the applicant has been living in Australia for a number of years, some of these with her child, and both are settled in the community. The applicant has taken steps to sever ties with China (such as giving up her employment and acquiring property in Australia). The cancellation of the visa would mean that the applicant may be required to leave Australia and give up what she has been able to achieve here, including business and personal ties. The applicant would be unable to sponsor her child and husband for visas. The Tribunal acknowledges the applicant's evidence concerning her health, including her and her child's mental health, although the Tribunal does not accept much of her evidence in that respect. Overall, the Tribunal accepts that the cancellation of the visa would cause hardship to the applicant and loss of opportunities including future visa options for the applicant and her family. The Tribunal accepts the applicant has contributed to the community and that several years passed since the non-compliance.
89. The Tribunal has formed the view that the best interests of the child would not be adversely affected by the cancellation and that the cancellation would not be in breach of Australia's non-refoulement obligations and family unity principles.
90. In this case, the Tribunal has decided to give greater weight to the fact that the decision to grant the visa was based on the incorrect information and the significance of that information to the applicant's eligibility for the visa. The Tribunal has formed the view that by the time of the grant of the permanent visa, the applicant was no longer the spouse of the sponsor because she was in a relationship with another person and her relationship with the sponsor was not to the exclusion of all others. The Tribunal is of the view that if that information was known to the decision-maker, the applicant would not have been granted the Partner visa, as that grant was based on the applicant being the spouse of the sponsor. Having regard to the entirety of the applicant's circumstances, the Tribunal has formed the view that in the particular circumstances of this case, this factor outweighs other considerations.
91. The Tribunal has decided that there was non-compliance by the applicant in the way described in the notice given under s.107 of the Act. Further, having regard to all the relevant circumstances, as discussed above, the Tribunal concludes that the visa should be cancelled.

DECISION

92. The Tribunal affirms the decision to cancel the applicant's Subclass (155) (Five Year Resident Return) visa.

Kira Raif
Senior Member